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No. 582

In the Supreme Court of the United States

October Term, 1931

WOODLAND REALTY COMPANY, INC., PETITIONER

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Discussion	3

CITATIONS

Cases:

Alabama By-Products Corp. v. *Commissioner*, 16 B. T. A. 1073, 18 B. T. A. 919 — 4

Bowman Hotel Corporation v. *Commissioner*, 24 B. T. A., decided December 19, 1931 — 4

Commissioner v. *Ben Ginsburg Company* (C. C. A. 2d), decided November 2, 1931, reported in Prentice-Hall Federal Tax Service (1931), Vol. 1, p. 2300.107 — 4

National Slag Co. v. *Commissioner*, 16 B. T. A. 1310, 47 F. (2d) 846 — 3, 4, 5

Planters Cotton Oil Company v. *Hopkins, Collector* (C. C. A. 5th), decided November 20, 1931, reported in Prentice-Hall Federal Tax Service (1931), Vol. 1, p. 2300.219 — 4

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 582

WOOLFORD REALTY COMPANY, INC., PETITIONER

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the instant petition.

OPINIONS BELOW

The opinion of the District Court (R. 8–10) is reported in 44 F. (2d) 856. The opinion of the Circuit Court of Appeals (R. 17–24) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1931. (R. 25.) Petition for a writ of certiorari was filed December 21, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the statutory net losses of a corporation, sustained in 1925 and 1926, when not affiliated with the petitioner, may be set up as a deduction under the Revenue Act of 1926 in a consolidated income tax return for 1927, when the corporation was affiliated with the petitioner and had no net income.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set forth in the Appendix to the petition, pp. 23–26.

STATEMENT

The District Court for the Northern District of Georgia sustained (R. 10) a demurrer to a petition in a suit to recover income taxes and interest (R. 5) paid by petitioner for 1927. The petition set forth the following facts (R. 2–6):

Petitioner corporation owned 96 per centum of the capital stock of the Piedmont Savings Company during 1927, and the two companies filed a consolidated income tax return for the calendar year 1927, showing net taxable income to petitioner of $37,582.63 and a loss to the Piedmont Savings Company of $453.80, and a combined net taxable income for the consolidated group of $37,128.53 (R. 3), upon which a tax with interest thereon was paid (R. 5).

Petitioner and the Piedmont Savings Company filed an amended consolidated income tax return

in May, 1928, claiming an additional deduction in the computation of the 1927 tax for the net losses sustained by the Piedmont Savings Company of $43,478.25 and $410.82, during the years 1925 and 1926, respectively. (R. 4.) This claim was denied by the Commissioner of Internal Revenue. (R. 5.)

The petition did not allege facts showing that the two corporations were affiliated prior to 1927 and the petition for certiorari concedes that they were not.

The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 17–25.)

DISCUSSION

The decision of the court below in the instant case seems to conflict with that of the Circuit Court of Appeals for the Third Circuit in *National Slag Co.* v. *Commissioner,* 47 F. (2d) 846. Although it is possible to distinguish the two cases upon the facts, we believe that they are contrary in principle. In the instant case there was no affiliation of the two corporations until the taxable year involved. In the *National Slag Co.* case, one of the affiliated corporations was not incorporated until the taxable year, but it continued an unincorporated business which had been owned by the individual who during the taxable year owned at least 95 per centum of the voting stock of each of the two corporations. Although the Circuit Court of Ap-

peals in the instant case said that the *National Slag Co.* case "did not decide the point before us" (R. 24), it refused to follow the *National Slag Co.* case in a later case involving a situation practically identical with that presented in that case. *Planters Cotton Oil Co., Inc.*, v. *Hopkins, Collector,* decided November 20, 1931, reported in Prentice-Hall Federal Tax Service (1931), Vol. 1, Par. 2123.

The decision in the instant case is in accord with that of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Ben Ginsberg Co., Inc.,* decided November 2, 1931, reported in Prentice-Hall Federal Tax Service (1931), Vol. 1, Par. 2021. The Board of Tax Appeals has twice changed its position on the question here involved. Its latest opinion followed the decision in the instant case. *Bowman Hotel Corporation* v. *Commissioner,* 24 B. T. A. — (decided December 19, 1931). In *Alabama By-Products Corporation* v. *Commissioner,* 18 B. T. A. 919, it changed its previous view, under which it had denied a deduction in situations similar to that here presented.

Although the cases mentioned arise under several different revenue acts, the provisions of most of the tax acts involved are identical.

In view of the uncertainty in the authorities, and particularly the apparent conflict between the decision in the instant case and that of the Circuit

Court of Appeals for the Third Circuit in *National Slag Co.* v. *Commissioner, supra,* we do not oppose the petition.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
JOHN R. MCEVERS,
Special Assistants to the Attorney General.
WILLIAM H. RILEY, Jr.,
Attorney.

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